

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

SOUTH SOUND OPTIONS UNLIMITED

Employer

And

Case 19-RD-3578

AMANDA WINSHIP, an individual

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 775¹

Union

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned makes the following findings and conclusions.³

¹ The name of the Union appears as amended in the hearing.

² Both parties filed timely briefs; thus the Union's motion to strike the Employer's brief as untimely is denied. However, as also argued by the Union in its motion to strike the Employer's brief, the Employer's brief contained evidence not presented at the hearing. The parties were afforded a full opportunity to present their respective positions and to produce the significant facts in support of their contentions at the hearing. See Section 101.20(c) of the Board's Statement of Procedure; *Barre-National, Inc.*, 316 NLRB 877, 878 (1995). Thus, the Union's motion to strike is granted as to those portions of the Employer's brief concerning evidence not presented at the hearing and those portions of the Employer's brief have not been considered.

³ The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer.

SUMMARY

The Employer and Union have had a history of collective-bargaining as evidenced by their most recent collective-bargaining agreement, which by its terms was effective from July 1, 2001, "until June 30, 2003." On May 1, 2003, the Petitioner filed the instant petition seeking a decertification election in a unit of 26 part-time and full-time employees of the Employer currently represented by the Union.⁴ The Union contends that the petition was untimely filed. In this regard, the Union contends that the Employer is a health care institution as defined by Section 2(14) of the Act, and that the window period for filing petitions during the term of a labor agreement should be the Board's window period for health care institutions (90 to 120 days) rather than the window period (60 to 90) applicable to all other employers who are not in the health care industry. The Petitioner and the Employer take the position that the Employer is not a health care institution and, thus, the appropriate filing period is 60 to 90 days.

Based on the record as a whole, I conclude that the Employer is a health care institution. Thus, I find the petition was untimely and consequently must be dismissed.

Below, I have set forth a section dealing with the facts as revealed by the record in this matter and relating to general background information about the Employer's operations; specifically about the programs it offers clients through contracts with State and local agencies. Following the Facts section is an analysis of the applicable legal standards in this case, and a section setting forth my Order dismissing the petition.

1.) Facts

A.) Background

The Employer is a State of Washington non-profit corporation with a place of business in Olympia, Washington, where it is engaged in the business of providing residential, community access and employment or vocational services to approximately 140 individuals who are senior citizens, medically fragile, developmentally disabled, and/or individuals with other barriers to employment. The Employer has a total staff of 47;⁵ 26 staff members are bargaining unit employees.

The Employer offers 3 separate programs for its clients. The three programs provide, among other things, job placement services and assisted living in residential homes provided by the Employer. Some of the Employer's clients participate in

⁴ The agreement between the Employer and the Union identifies the unit recognized as a unit of all regular full-time and part-time employees including coordinators; excluding office clerical, Directors, managerial employees, and supervisors as defined in the Act.

⁵ This figure apparently includes the bargaining unit members as well as managers, §2(11) supervisors and office clerical employees.

more than one of these programs. The majority of the Employer's funding comes from the State of Washington Department of Social and Health Services.

Supported Employment Program (SEP)

The first program, SEP, employs 3 or 4 bargaining unit employees to provide job development and job assessment services for 5 to 20 clients a month. The program is run through a contract with the State of Washington, Division of Vocational Rehabilitation (DRV). Through this program, the Employer attempts to secure employment for clients referred to it by DRV and the Division of Developmental Disabilities (DDD) by having one of the Employer's three job developers go into the community to develop job opportunities.⁶ Job developers also assess disabled clients for employment. Other SEP employees develop and provide vocational or jobs training for the clients in the program. Apparently, the SEP training function overlaps with the Employer's Community Access Program, described below. Training offered by the SEP includes learning to utilize the public bus system, training in the requirements of a job, and job coaching.

The Employer may devote as little as one hour a month to some clients in SEP. Other clients may take more time and the amount of time spent with the clients depends on the individualized contract reached between the Employer and the DVR.

Although clients who participate in this program cannot be "medically fragile," occasionally, an employer, who is employing one of the Employer's clients, has communicated a behavioral problem with a referred client. To deal with these problems, a job developer will participate in conferences with psychiatrists and other health care professionals on how to deal with a client's behavioral problems. However, the job developer's participation is limited to assessing the employment barriers confronted by a client. Unlike employees assigned to the Employer's residential homes, none of the employees connected to the SEP is trained as a registered nurse assistant (NAR); consequently, SEP employees do not service the clients' medical needs. The Employer requires high school degrees of its employees in this program. One SEP employee has a business degree.

Community Access Program (CAP)

The second program, CAP, employs 11 employees⁷ to provide job training or other community access services through contracts with the County for 77 clients who are over 55, are medically fragile, or confront barriers to employment. Presently, all clients admitted to this program are admitted because they are over 55

⁶ It is not clear whether all three "job developers" are unit employees as the Employer employs a number of managers and/or supervisors who also appear to be directly involved in assisting the Employer's clients.

⁷ It is not clear whether unit employees comprise all or just a portion of these 11 employees.

years of age. The program presently does not have clients who are medically fragile or have barriers to employment. Besides offering employment related services, employees also drive clients to community events such as bowling and assist clients in shopping. Depending on the client, some employees may drop off a client at an event and return for them or employees may simply remain with the client during the event for purposes of assistance. None of the CAP employees are NARs. High school degrees are required of employees in this program. Some of the employees have BA degrees in such areas as education, home economics and alcohol and drug education.

Supported Living Program (SLP)

The third program, SLP, employs 3 bargaining unit employees to help 24 supported living clients – those with their own apartments or homes -- while 15 additional bargaining unit employees provide continuous (24 hours a day, 7 days a week) Intensive Tenant Support (ITS) services for 11 clients in 3 Employer provided resident homes.⁸

Services provided to supported living clients include, among others, providing access to medical care, insuring residents have groceries, and assisting in check balancing. Providing access to medical care includes reminding clients of upcoming medical appointments and helping to schedule and make doctor appointments. In this regard, the Employer maintains a list of all independent living clients with their scheduled annual physicals. Eight of the 24 nonresident clients also participate in SEP; one of these 8 is also in CAP. One employee servicing the independent living clients has a Bachelors degree in communications, one employee has a degree in education, and the record is silent as to the education of the third employee.

As noted above, the Employer also provides Intensive Tenant Support (ITS) services to its residential clients in a more structured home environment. The Employer maintains 3 resident homes for this purpose. The homes provide continuous (24 hours a day, 7 days a week) care to 11 clients who require intensive tenant support. Fifteen bargaining unit employees, classified as residential support staff or living skills instructors, provide services to developmentally disabled clients who reside in the homes. The State of Washington requires registered nurse assistant (NAR) certification to service the Employer's residential clients. Unlike the bargaining unit employees employed in the SEP and CAP, the SLP bargaining unit employees assigned to the 3 homes are required to have NAR certification. The certification requires 32 hours of training, which includes a core training of 8 hours in how to apply oral and topical medication and how to dispense pills. In terms of the training, the State, in addition to administering the NAR certification test, only provides the 8-hour core training. The balance of training comes from other sources including 8 hours of in-house training by the Employer with the balance of training coming from continuing education programs. As part of their training, NARs are required to have first-aid and CPR training.

⁸ The record discloses the Employer's entire staff, which is devoted to this program, consists of 22 individuals, which includes 18 unit employees.

As for the duties of the ITS employees, they administer, monitor and keep track of ITS residents' medication, which is kept in a locked box. They will queue the residents for breakfast. When necessary they will also, use gait belts to transfer clients into wheelchairs, assist residents in showering or bathing, and assist residents in other toiletry functions.

NARs (unit employees) provide health care services to three particular residents of the Employer's home, which include applying eye cream, monitoring glucose levels in diabetic residents, and feeding a client through a surgically implanted feeding tube. A registered nurse, who delegates the performance of these health care services to the NARs, periodically oversees these types of services.

The Employer contracts out the registered nurses services. The registered nurse will instruct a NAR in performing the necessary and delegated tasks normally performed by the registered nurse. In this regard, the registered nurse will check up on the residents every six weeks to make sure they are stable. The check-up will include insuring that the Employer's staff properly dispenses the correct medications, looks for side effects to medications, and receives information concerning changes in matters relating to medications.

ITS staff is also responsible for logging in the medications, performing delegated resident health care services, and for overseeing residents' activities. The logs are audited by the State. ITS staff also keep a medical administration report (MAR) setting forth the types and dosage of medications taken by the residents and setting forth the residents' respective doctors. MARs are available for review by the doctors and registered nurses.

The staff has also been instructed by a mental health counselor on how to help a particular resident with her mental health issues, and instructed by a physician on special eye exercises for another resident. Contracted physical therapists have also delegated certain physical therapy tasks to NARs to perform on the Employer's clients, such as range of motion exercises.

The living skills instructor assigned to a resident, along with a State caseworker, the Employer's house manager, and a resident's guardian develop an individual support plan for each resident. Among other things, these plans deal with health care issues.⁹

The Employer's mission statement reads, "SSOU provides quality support to individuals with disabilities which enables them to make educated choices, develop independence and enrich our community." Currently, however, it is not anticipated that any of the resident clients will move to an independent living program.

⁹ It should be noted that the Employer's employees, who work with the residents, also oversee and/or work with some of the residents to perform normal housekeeping functions, including cleaning and routine maintenance, in the Employer's three homes.

2.) Analysis

Petitioner seeks a decertification election of the unit represented by the Union. The Union contends, contrary to the Petitioner and the Employer, that the petition was untimely filed and, thus, should be dismissed. Without setting forth all of the rules regarding the contract-bar principle, suffice it to say that as a general matter a collective-bargaining agreement having a fixed term, not exceeding 3 years, will bar the filing of a petition for an election by a rival union, or by employees seeking to decertify the Union, or by an employer who questions the Union's continued majority status, unless filed 90 to 60 days prior to the contract's expiration date, or after the expiration date if no new contract has been executed during the insulated period, assuming no premature extension. *Leonard Wholesale Meats*, 136 NLRB 1000 (1962); *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). However, in the health care industry, the petition must be filed more than 90 days and less than 120 days before expiration of the collective-bargaining agreement. *Trinity Lutheran Hospital*, 218 NLRB 199 (1975).

In view of the above and the parties' respective positions in this case, the primary issue is whether the Employer is a health care institution as that term is defined by Section 2(14) of the Act. Sec. 2(14) states that the term 'health care institution' "shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person."¹⁰ The definition is written in the broadest terms and the legislative history of the amendment clearly reveals that Congress intended that the Board's jurisdiction be extended to the entire patient-oriented health care industry.¹¹ See *Beverly Farm Foundation, Inc.*, 218 NLRB 1275, 1276 (1975).

In *Beverly Farm Foundation*, the Board found an employer, which provided residential care and training for "mentally retarded"¹² persons to be a health care institution. There, the staff was comprised of maintenance, laundry, housekeeping, and dietary personnel, as well as non-state-certified teachers, cottage attendants, a registered nurse, a physician, and a psychiatrist. The cottage attendants provided the regular care for the residents, including dressing and feeding them, ensuring that they attend classes and training sessions, and dispensing medicines. See also *Community Living*, 285 NLRB 312 (1987)(operating residential facilities that provide tenant support systems and rehabilitative training for physically handicapped and mentally retarded persons a §2(14) health care institution); *Lutheran Association for*

¹⁰ Pub. L. 93-360, §1(b), July 26, 1974, 88 Stat. 395, added par. (14).

¹¹ ...we do not mean [the term health care institution] just as to the sick or aged. We mean it also to apply to specialty health services, to private institutions caring for the mentally retarded, and the like." Cong. Rec.—House, H 4594 (daily ed., May 30, 1974); "Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974—Public Law 93-360 (S.3203)," pp. 305-306.

¹² Although the Employer refers to its clients as "developmentally disabled" as opposed to mentally retarded, this term apparently is merely a more expansive term, which essentially covers the "mentally retarded," as well as those whose neurological conditions are closely related to mental retardation. *Chicago School & Workshop for the Retarded*, 225 NLRB 1207, 1208 (1976).

Retarded Children, 218 NLRB 1278 (1975); *MCAR, Inc.*, 333 NLRB No. 134, slip op. at 7 (2001).

Here, the Employer's residential employees – the majority of its unit employees -- not only perform housekeeping functions but assist in tending to the residents' medical needs and much of that assistance was directed by doctors, registered nurses, physical therapists, and other health care professionals. Indeed, the residential employees are required by the State to be registered nurses assistants. Although no health care professional is on staff, such health care professionals nevertheless provide professional medical services to the Employer's residential clients either under contract with the Employer or through the State. See, e.g., *Home of Guiding Hands*, 218 NLRB 1278 (1975).

The Employer also tends to the needs of 24 supported living clients, including insuring those clients can access their medical care. In short, the Employer's operations tend to its residents' and supported living clients' medical needs.

Although the Board in *Beverly Farm Foundation* found the programs of that particular institution were not designed to prepare the resident for eventual return to society, and here, the Employer's goal is for its clients to reach independence, the Board has found this difference in goals is not sufficient to make the findings in *Beverly Farm Foundation* inapplicable to employers like the Employer here. See *Chicago School*, 225 NLRB at 1208. And, although the Board in *Chicago School* noted that most of the clients in that case remained in the program and were not placed in private industry, I note that there is no anticipation that any of the Employer's residential clients will move into a more independent living situation. The record in this case establishes that a significant majority of the Employer's unit employees provides medical assistance to the Employer's residential clients and aids 24 clients who live in the community in accessing their medical care. The record also indicates that few of the Employer's unit employees are exclusively dedicated to placement of clients in private industry. Thus, the Employer's operation is substantially devoted to the care of "sick, infirm, or aged" clients or residents.¹³

¹³ The Employer's cite to *Abilities and Goodwill, Inc.*, 226 NLRB 1224 (1976) is inapposite. The Board in that case found the employer's programs were vocational rather than medical in nature. Here, unlike the employer in *Abilities and Goodwill*, the Employer provides other services besides vocational training, including providing medical services and medical assistance to many of its clients or residents. Indeed, unlike most of the employees in *Abilities and Goodwill* who had no medical assistance duties, most of the Employer's unit employees are required to be State certified registered nurse assistants who assist in providing medical services to clients or residents. Although the Employer provides vocational training and/or services to some of its clients, those clients time with the Employer is short term in that the Employer devotes as little as one hour each to some of those clients before the contract, for those clients, terminates by its own accord.

The Employer also argued that where its clients receive their medical care is critical to the decision in this case. In this regard, I note that the Board in *Abilities and Goodwill* distinguished the employer there from the employer in *Beverly Farm*, supra, in that the employer in *Beverly Farm* provided permanent residential care for substantially all its clients and the employer in *Abilities and Goodwill* provided permanent residential care for only a small percentage of its clients. However, since *Abilities and Goodwill*, the Board has found "visiting nurses associations," which provide nursing and related services to patients in the patients' homes, are §2(14) health care institutions. Thus,

Accordingly, I find the Employer is a health care institution as defined by Section 2(14) of the Act.

Having found the Employer is a health care institution, I find the petition was untimely filed. Accordingly, dismissal of the petition is warranted.

ORDER

In light of the above and the record as a whole, the petition is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on July 7, 2003. The request may **not** be filed by facsimile.

DATED at Seattle, Washington this 20th day of June 2003.

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location of care is not a significant factor in the circumstances of this case. See, e.g., *United Food & Commercial Workers, Local No. 1996 (Visiting Nurse Health System, Inc.)*, 336 NLRB No. 35 (2001).